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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 388

UNITED FRUIT COMPANY,
Petitioner,

vs.

W. E. HEDGER TRANSPORTATION CORPORATION.

PETITION

FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD M. KENNEDY,
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Dated: October 10, 1952.

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United Fruit Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 15, 1952.

Opinions Below

The opinion of the District Court for the Southern District of New York (R. 4) is reported at 97 F. Supp. 729. The opinion of the Court of Appeals for the Second Circuit (R. 25) is reported at 198 F. (2d) 376.

Jurisdiction

The judgment of the Court of Appeals was entered on July 15, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

The primary question presented is whether, in an action at law for negligent damage to property in which plaintiff has invoked the civil jurisdiction of the District Court on grounds of diversity of citizenship and has demanded a trial by jury, the admiralty rule of divided damages in collision cases shall be applied on the ground that the alleged tort occurred on navigable waters, notwithstanding the fact that under the law of New York, in whose territorial waters the alleged tort occurred, plaintiff's contributory negligence would be a complete defense to such an action.

Also presented is the question whether in such an action the District Court is required to apply the law of the state in which the alleged tort occurred, imposing upon plaintiff the burden of proving its freedom from contributory negligence.

Statute Involved

Sections 1331-3 of Title 28, U. S. Code, provide in part as follows:

> "§ 1331. *Federal question; amount in controversy*
>
> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.
>
> § 1332. *Diversity of citizenship; amount in controversy*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States;
>
> • • •

§ 1333. *Admiralty, maritime and prize cases*

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. • • •"

Statement

This action was brought by respondent, owner of barge AMERICAN TRANSPORT, to recover damages occasioned by the sinking of the barge allegedly caused by petitioner's negligence in the manner of loading the barge with sand ballast in New York Harbor (R. 4-5). The complaint invoked the jurisdiction of the Court on the ground of diversity of citizenship (R. 4). Respondent demanded a trial by jury (R. 1). Petitioner denied negligence and alleged contributory negligence as a defense (R. 9). At the conclusion of the trial at which the issues of negligence and contributory negligence were sharply contested, and over respondent's objection, the jury was charged in accordance with New York law that the burden was upon the plaintiff to prove its freedom from contributory negligence (R. 18).

By special verdict the jury found that both parties' negligence contributed to the sinking and that respondent's damages were $7,200 (R. 2). The Trial Court held that the defense of contributory negligence had been sustained (R. 4-8) and judgment was entered for petitioner (R. 2-3).

On appeal the judgment of the District Court was reversed (R. 31). The Court of Appeals held that upon a finding that both parties' fault contributed to the damage respondent was entitled to recover one-half its damages. It further held that the instructions with respect to the burden of proof of contributory negligence were erroneous (R. 30), and remanded the case for a new trial unless

respondent should elect to take judgment for one-half the damages found by the jury (R. 31).

It is thus within respondent's power, by electing to take judgment for half damages, to make the judgment below final in every sense. But even if respondent were to elect a new trial, and whatever the outcome, the decision below disposes finally of the question whether plaintiff's contributory negligence is a defense to the action and will stand as a precedent on that question, controlling in the Second Circuit and of persuasive authority elsewhere, unless reviewed by this Court.

Reasons for Granting the Writ

The decision below should be reviewed because it is a novel and far-reaching extension of the rule of divided damages hitherto applied by this Court only in collision litigation in admiralty and because it is in conflict with past decisions of this Court.

This Court recently refused to extend the divided damages rule to an action at law in which one tort feasor sought contribution from another in respect of damages to an innocent third party for which the first had been held liable. *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, 342 U. S. 282. The Court there summarized that rule in these words:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases" (284).

The Court pointed out that "courts exercising a common-law jurisdiction have generally held that they cannot

on their own initiative create an enforcible right of contribution as between joint tortfeasors" and concluded that "it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action" (285).*

The decision below, it is submitted, is just such a fashioning of a "new judicial rule" in a matter of utmost importance in all litigation, whether in state courts or in federal courts exercising diversity jurisdiction, arising from incidents occurring within the territorial waters of the several states. If affirmed it would in effect compel the adoption in all such cases of the divided damages rule, regardless of the law of the state in whose territorial waters the cause of action arose. To that extent it would overrule *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, where this Court laid down the rule that in diversity cases the law to be applied in any case is the law of the State "Except in matters governed by the Federal Constitution or by Acts of Congress" (p. 78). In *Palmer* v. *Hoffman,* 318 U. S. 109, 117, this rule was applied to the question of the burden of establishing contributory negligence. In no case has this Court excepted cases arising on the navigable waters of a state from the application of the *Erie* rule, except in matters governed by the Federal Constitution or by Acts of Congress, or where rights peculiar to the maritime law have been asserted.

The decision below is in direct conflict with *Belden* v. *Chase,* 150 U. S. 674, where the Court said:

> "* * * But at common law the general rule is that if both vessels are culpable in respect of faults operat-

---

* The right of contribution in collision cases in respect of liabilities to third parties derives directly from the right of the colliding vessel which has satisfied that liability to have the admiralty court equalize the collision damages as between it and the other vessel. "Contribution" and "half-damages" are thus varying applications of the same rule. (See *The Chattahoochee,* 173 U. S. 540).

> ing directly and immediately to produce the collision, neither can recover damages for injuries so caused. *Atlee* v. *Packet Co.* 21 Wall. 389
>
> In order to maintain his action, the plaintiff was obliged to establish the negligence of the defendant, and that such negligence was the sole cause of the injury, or, in other words, he could not recover, though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of" (691).

The Court below held "that the doctrine of *Belden* v. *Chase* no longer has vitality" (R. 30) by reason of the decisions of this Court in *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255, *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239 and *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85.

The Court below overruled its own earlier decision in *Johnson* v. *United States Shipping Board*, 24 F. (2d) 963, (reversed on other grounds, 280 U. S. 320) where it had said:

> "* * * The plaintiff in error now argues that this was a maritime tort, and that the maritime law controls, and therefore the contributory negligence was not an absolute bar to a recovery. We think the court correctly instructed the jury, under the authority of Belden *v.* Chase, 150 U. S. 674, 14 S. Ct. 264, 37 L. Ed. 1218, Atlee *v.* Packet Co., 21 Wall. 389, 22 L. Ed. 619, and Maleeny *v.* Standard Shipbuilding Co., 237 N. Y. 250, 142 N. E. 602. We have not overlooked the Castagna Case (C. C. A.) 280 F. 618, where, in a dictum, it was inadvertently stated that the rule is different than stated in *Belden* v. *Chase*, supra" (963-4).

The rule of *Belden* v. *Chase* had also been adhered to by the Court below in *Wolker* v. *Electric Ferries, Inc.*, 82 F. (2d) 1023,* *cert. den.* 299 U. S. 540, by the Court of Appeals

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* The District Court decision, which was affirmed without opinion, is not officially reported but appears at 1936 A. M. C. 1550.

for the Ninth Circuit in *Puget Sound Navigation Co.* v. *Nelson,* 41 F. (2d) 356, *cert. den.* 282 U. S. 869, and by the Court of Appeals of the State of New York in *Maleeny* v. *Standard Shipbuilding Corp.,* 237 N. Y. 250 and *Boles* v. *Munson Lines,* 260 N. Y. 516. It has apparently been repudiated by the Court of Appeals for the third circuit in *Hawn* v. *Pope & Talbot Inc.* (August 27, 1952), F. (2d) , and by the Supreme Court of California in *Intagliata* v. *Shipowners & Merchants Towboat Co.,* 26 Cal. (2d) 365; cf. *Somerset Seafood Co.* v. *U. S.,* 4 Cir., 193 F. (2d) 631, 640.

The decisions relied on by the Court below do not overrule *Belden* v. *Chase.* They did not involve common law actions for negligence but rather the enforcement of rights peculiar to maritime law. The point of *Carlisle Packing Co.* v. *Sandanger* was that a crew member's right to recover indemnity for personal injuries was not dependent upon negligence but could be grounded on a breach of the employer's absolute duty to provide a seaworthy vessel, a concept unknown to the common law. See *The Osceola,* 189 U. S. 158. The statement of this Court in the *Sandanger* case that "the general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law Court" (p. 259) was made in reference to the enforcement of this seaman's right, peculiarly the creature of maritime law.

The same right was involved in *Seas Shipping Co.* v. *Sieracki,* where the Court held that it could be invoked by a longshoreman injured on the vessel although not in the employ of the shipowner. Here, too, the right involved was regarded as "peculiar to the law of admiralty" (p. 88) so that the source of the law to be applied was the general maritime law.

Garrett v. *Moore-McCormack Lines, Inc.* involved the enforcement in a state court of causes of action under the Jones Act (41 Stat. 1007; 46 U. S. C. A. § 688), and for maintenance. Because the source of the rights asserted

was the maritime law, including the federal statute for the protection of seamen, it was held that the courts of Pennsylvania were required to enforce them with all their incidents, including the seamen's traditional freedom under the maritime law from the burden of proving the invalidity of a release.

None of these cases involved the question whether a plaintiff's contributory negligence is a defense in a common-law action for negligence based upon a tort occurring within the territorial waters of a state whose law recognizes such a defense in negligence actions generally.

The Court below declined to apply New York law, saying that "we think the appeal should be decided under the maritime law rather than the local law of the state" (R. 30). If, as this statement seems to indicate, the court considered that it must look directly to the maritime rather than the local law in all actions at law involving maritime torts, its view is contrary to that expressed in *Caldarola* v. *Eckert,* 332 U. S. 155, 158, where this Court, dealing with a tort on New York waters said:

> "* * * In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises."

Here, likewise, the determination of the New York courts that there is no remedy in her courts, in an action for negligence, for a party whose own negligence has contributed to the damage is decisive and, unless an exception is to be made to the rule of *Erie* v. *Tompkins,* controlling upon the Federal Court exercising diversity jurisdiction.

The court below suggests alternatively that, assuming *Erie* v. *Tompkins* to be applicable, the result would be the same because New York would look to the admiralty rule

to determine the effect of contributory negligence (R. 30). This begs the very question to be decided.

Riley v. *Agwilines, Inc.*, 296 N. Y. 402, upon which the court below relied, did not involve any issue of contributory negligence, that question having been disposed of in plaintiff's favor by the verdict. The New York Court of Appeals had previously followed the rule of *Belden* v. *Chase* in *Maleeny* v. *Standard Shipbuilding Corp.*, 237 N. Y. 250 and in *Boles* v. *Munson Lines*, 260 N. Y. 516.

It was on quite a different question, i.e. the applicability of a New York statute, that the New York Court of Appeals in *Riley* v. *Agwilines*, referred to *Robins Dry Dock Repair Co.* v. *Dahl*, 266 U. S. 449, as having overruled the *Maleeny* case. In the *Robins* case, as in the *Riley* case, the question of contributory negligence had been disposed of by the jury's verdict in plaintiff's favor upon a charge that such negligence, if found, would be a complete defense (see 266 U. S. at 455). That the New York Court of Appeals did not regard *Maleeny* as having been overruled on the issue here presented is plain from the decision in *Boles* v. *Munson Lines*, decided long after the *Robins* case, where the Court of Appeals unanimously reversed a lower court decision as to the effect of contributory negligence, citing the *Maleeny* case and *Johnson* v. *U. S. Shipping Board*, 2 Cir., 82 F. (2d) 963.

It is plain from the *Maleeny* and *Boles* cases that New York will apply its own rule in such cases unless required to do otherwise by the decision of this Court upon the question now presented.

In summary, no decision of this Court requires or justifies interpreting the "saving to suitors" clause of the Judiciary Act of 1789, 1 Stat. 77, and its modern counterpart, 28 U. S. C. § 1333, as requiring the courts of New York, or the federal courts exercising diversity jurisdiction, to provide, in common law actions for negligence arising

on New York territorial waters, a remedy unknown to the common law of New York, i.e. recovery of half damages by a party whose own negligence has contributed to the loss.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

HAROLD M. KENNEDY,
Counsel for Petitioner.

October 10, 1952.

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BRIEF FOR RESPONDENT IN OPPOSITION.

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Attorney for Respondent.

November 15, 1952.

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Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

The first question presented is whether the admiralty rule of divided damages is to be applied in a case involving a maritime tort for damage to property, occurring on navigable waters, where the action is brought at law.

The second question is whether, in such an action, the burden of proof with respect to contributory negligence is upon the plaintiff or whether the admiralty rule, which casts the burden upon the defendant, should be applied.

We except to petitioner's statement of the questions presented, insofar as it may be regarded as inferring that jurisdiction of the District Court was based solely upon diversity of citizenship. The District Court also had original jurisdiction by virtue of Section 1333 of Title 28, U. S. Code, which is quoted by petitioner under "Statute Involved", at page 3 of its brief.

Statute Involved.

The pertinent provisions of Sections 1331 to 1333, inclusive, of Title 28, U. S. Code, are set forth in the petition.

Statement.

Respondent brought this action to recover damages arising out of the negligent sinking by petitioner, of the barge "American Transport" (R. 9). The acts complained of took place on navigable waters in New York Harbor (R. 6).

Petitioner affirmatively pleaded contributory negligence as a defense (R. 9). The trial court, however, charged that respondent had the burden of proving its freedom from contributory negligence (R. 30-1).

The jury found, in a special verdict, that both petitioner and respondent had been guilty of negligence and

that respondent's damages were $7,200. (R. 2). Thereupon petitioner moved for judgment dismissing the complaint (R. 5). Respondent moved for judgment for half damages or $3,600., in accordance with the admiralty rule enunciated in The Max Morris, 137 U. S. 1 (R. 5).

The trial court, in its opinion, ruled that although the case involved a maritime tort occurring in navigable waters, contributory negligence was a complete defense since the action was brought on the law side of the court (R. 4-8). It should be noted that this conclusion was reached by the trial court with certain misgivings (R. 6-8). Thus the trial court agreed, that the prevalence of a view that a maritime tort should be governed by the "general maritime law", rather than that of the particular forum in which the litigant chances to seek redress, would promote the uniformity aimed at in vesting the courts of the United States with admiralty jurisdiction (citing cases) (R. 6-7). The trial court also agreed that broad statements in the opinion of recent cases, particularly *Garrett* v. *Moore-McCormack*, 317 U. S. 239; *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, and other cases, lent support to respondent's position (R. 7). The trial court nevertheless concluded that it felt bound to follow what it considered to be the rule in the Second Circuit * * * "whatever might be the independent view of the Court" on the question (R. 7-8).

Prior to the entry of judgment in petitioner's favor, respondent also moved for a new trial on the ground that the charge to the jury, placing upon it the burden of proving freedom from contributory negligence was incorrect. This motion was denied without opinion (R. 27).

The Court of Appeals reversed upon two grounds: It held first, that the maritime rule of divided damages should have been applied, despite the finding of contribu-

tory negligence (R. 28-30). It also held that the trial court had improperly placed the burden of proving freedom from contributory negligence, upon respondent (R. 30-31). The Court of Appeals pointed out, that in *Garrett* v. *Moore-McCormack Co.,* 317 U. S. 239, the Supreme Court had upheld the necessary dominance of admiralty principles in vindication of rights arising under admiralty law, had expressly disregarded *Belden* v. *Chase,* 150 U. S. 674, cited to the contrary (29).

The Court of Appeals also noted that *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85 (which cited the *Garrett* case), and *Carlisle Packing Co.* v. *Sandanger,* 259 U. S. 255, had settled the rule that

> "A right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court" (R. 29).

The court below also pointed out, that in a Virginia case, cited by this court in a footnote to the *Garrett* case, the admiralty rule as to contributory negligence was also applied (R. 30). The court noted that text writers had likewise recognized that the doctrine of *Belden* v. *Chase* no longer had vitality (R. 30). The court concluded, on this question, that even if *Erie* v. *Tompkins,* 304 U. S. 64, were thought to be applicable, the result would be the same; New York also looks to admiralty principles to determine the effect of contributory negligence (citing *Riley* v. *Agwilines, Inc.,* 296 N. Y. 402) (R. 30).

As to the question of burden of proof, the court below again cited this court's decision in the *Garrett* case (R. 31). The court cited cases showing that the admiralty rule placed the defense of contributory negligence on the defendant. It added, quoting from the *Garrett* case:

> "A plaintiff's freedom from this burden is a 'part of the very substance of its claim and cannot be considered a mere incident of a form of procedure'" (R. 30).

Respondent was accordingly awarded a new trial unless it elected to take judgment for one-half damages (R. 31).

Argument.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, squarely disposes of the questions here involved, and it is difficult to understand how it can seriously be argued to the contrary. But aside from the *Garrett* case, other decisions by this court have time and time again pointed to the same conclusion. Nor is there any contention by petitioner that there exists, at this time, any conflict in the decisions of the respective circuits. Aside from the present holding of the Second Circuit, we have the following cases in other circuits which support respondent's position:

First Circuit: *Doucette* v. *Vincent*, 194 F. (2) 834; *Jansson* v. *Swedish-American Lines*, 185 F. (2) 212.

Third Circuit: *Hawn* v. *Pope & Talbot, Inc.*, 198 F. (2) 800.

Fourth Circuit: *Somerset Seafood Co.* v. *U. S.*, 193 F. (2) 631.

On the other hand, *no circuit* has taken petitioner's view since the *Garrett* case was decided.

Puget Sound Navigation Co. v. *Nelson* (9 Cir.) 41 F. (2) 356 (cert. den. 282 U. S. 869), which adhered to *Belden* v. *Chase*, was decided in 1930. This was a dozen years before the *Garrett* case, questioning Belden, was decided.

But even in the *Puget Sound* case, the 9th Circuit, while following *Belden* v. *Chase*, as it then felt obliged to do, stated (41 F. [2] 356-357):

> "And, while this action was tried on the common-law side of the court, the rights and liabilities of the parties are measured by the admiralty law, and not by common-law standards. *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171."

Significantly, in 1945, the Supreme Court of California, sitting *en banc*, in *Intaglaita* v. *Ship Owners and Merchants Tow Boat Co.*, 26 Cal. (2) 365; 159 P. 211); 1946 A. M. C. 263, expressly refused to follow the *Puget Sound* case, in the light of the repudiation of *Belden* v. *Chase* by this court, in the *Garrett* decision.

There is therefore unanimity of opinion throughout the country on the questions which petitioner seeks to present. In any event, in the light of the *Garrett* case and other decisions by this court in recent years, settling the questions presented, there certainly is no occasion for further review.

• • • • •

A further preliminary point deserves attention. Petitioner quotes from *Halcyon Lines* v. *Haenn Shipping Ceiling Corp.*, 342 U. S. 282, at page 4 of the Petition. In the course of that opinion, this court remarked that the maritime rule, where mutual wrongdoers share in damage, has never been expressly applied in non-collision cases.

It should be noted that in the *Halcyon* case, the court was dealing with contribution, in the sense used, when one joint tort-feasor seeks to recover against another, for injuries to a third person. It had nothing to do with the ordinary admiralty rule limiting recovery to half dam-

ages or to comparative damages, resulting from the contributory negligence of the injured plaintiff himself. In fact, the latter doctrines have been specifically approved by this Court, even as to non-collision cases. In "The Max Morris", 137 U. S. 1, this court approved the rule of divided damages where contributory negligence was present, in such non-collision situations, saying at pages 13-14:

> "The rule giving one half of the damages has been applied by the District and Circuit Courts in the Southern District of New York, in cases where a boat and her cargo were lost or damaged through negligence on the part of a steam-tug which towed the boat, where there was fault also on the part of the boat. *Those were not cases of collision,* and there was no damage to the steam-tug, and she *alone* was sued for the loss. Such cases were those of *Mason* v. *Steam-Tug William Murtaugh,* 3 Fed. Rep. 404, and *The William Murtaugh,* 17 Fed. Rep. 260; *Williams* v. *Steam-Tug William Cox,* 3 Fed. Rep. 645, affirmed by the circuit court, *The William Cox,* 9 Fed. Rep. 672; *Connolly* v. *Ross,* 11 Fed. Rep. 342; *The Bordentown,* 16 Fed. Rep. 270. Also, in cases where the vessel towed was held to be in fault for not being in proper condition (*Philadelphia & R. R. Co.* v. *New England Transp. Co.,* 24 Fed. Rep. 505); and where a boat was injured by striking the bottom of a slip, in unloading at the respondent's elevator, the boat herself being also in fault (*Christian* v. *Van Tassel,* 12 Fed. Rep. 884); and where the vessel towed was old and unseaworthy. *The Syracuse,* 18 Fed. Rep. 828; *The Reba,* 22 Fed. Rep. 546. In *Snow* v. *Carruth,* 1 Spr. Adm. 324, in the District Court for the District of Massachusetts, damage to goods carried by a ves-

sel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.

"*All these were cases in admiralty, and were not cases of collision between two vessels.* They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery." (Italics ours.)

Petitioner itself, does not contend that the *Halcyon* case was intended to change the admiralty rule allowing partial damages, despite contributory negligence. In fact, in the court below, petitioner frankly referred to the *Halcyon* case as "not involving the issue here presented." However, petitioner, in this court, as it did in the court below, argues that the *Halcyon* case indicates that the doctrine of half-damages should not be extended. It is not clear how the decision in the court below "extends" the half-damage rule. The decision is merely an affirmation of the *Garrett* rule that maritime action is governed by admiralty principles, whether the action be brought in admiralty or at law; it holds that consequently, the *existing* half-damage rule of admiralty is properly applied on the law side of the court. No new half-damage or comparative negligence rule can fairly be read or implied from the Court of Appeals' opinion.

POINT I.

The decision in the court below merely conforms to the now well established rule, that an action at law arising out of a maritime tort is governed by admiralty principles. Accordingly, contributory negligence is not a complete defense to such an action.

Whatever doubt may have been engendered by *Belden* v. *Chase*, 150 U. S. 674, appears to have been completely resolved by more recent decisions of the Supreme Court and by other respectable authority. These cases uniformly hold, that cases arising out of a maritime tort, require the application of the substantive admiralty law, whether brought at law or in admiralty; whether commenced in a state or in a federal court:

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239 (decided 1942);
Intagliata v. *Ship Owners & Merchants Tow Boat Co.*, 26 Cal. (2) 365; 159 P. (2) 11; 1946 A. M. C. 263 (decided 1945);
Seas Shipping Co. v. *Sieracki*, 328 U. S. 85 (decided 1946);
Socony Vacuum Oil v. *Smith*, 305 U. S. 424 (decided 1939);
Beadle v. *Spencer*, 298 U. S. 124 (decided 1936);
Arizona v. *Anelich*, 298 U. S. 110 (decided 1936);
Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255;
Robins Dry Dock Repair Co. v. *Dahl*, 266 U. S. 449;
Chelentis v. *Luckenbach S.S. Co.*, 247 U. S. 372.

Garrett v. *Moore-McCormack Co.*, 317 U. S. 239, was an action at law by a seaman in a Pennsylvania State

court. It was brought *both* under the Jones Act and by virtue of his common law remedy for maintenance and cure. The question involved was whether the plaintiff had the burden of proving that his general release was procured by fraud and misrepresentation (as required by Pennsylvania law), or whether defendant had the burden of sustaining the effectiveness of the release (the admiralty rule).

Plaintiff there contended that "when a cause of action arises under the Maritime Law, that law governs on all matters of substance to the exclusion of the state law, even though suit is brought in the state courts". Defendant argued that where a seaman elects to bring his action in a state court, the common law of that state governs (citing *Belden* v. *Chase, supra*). This court held: First, that the maritime law applied, irrespective of forum; second, that the burden of proof was not procedural, but substantive in character. Thus this Court said at pages 243-244:

> "*1. Respondent's argument that the Pennsylvania court should have applied state rather than admiralty law in measuring the rights of parties cannot be sustained.
>
> • • • • •
>
> "There is no dearth of example of the obligation on law courts which attempt to enforce substantive rights arising from admiralty law to do so in a manner conforming to admiralty practice. Contributory negligence is not a barrier to a proceeding in admiralty or under the Jones Act, and the state courts are required to apply this rule in Jones Act actions. *Beadle* v. *Spencer*, 298 U. S. 124, 80 L. ed. 1082, 56 S. Ct. 712. Similarly state courts may

not apply their doctrines of assumption of risk in actions arising under the Act. *The Arizona* v. *Anelich*, 298 U. S. 110, 80 L. ed. 1 (75, 56 S. Ct. 707; *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 83 L. ed. 265, 59 S. Ct. 262. State courts, *whether or not* applying the Jones Act to action arising from maritime torts, have usually attempted, although not always with complete success, to apply admiralty principles. The federal courts when treating maritime torts in actions at law rather than as suits in admiralty have also sought to preserve admiralty principles whenever consonant with the necessities of common-law procedure." (Italics ours.)

And pointedly refusing to follow *Belden* v. *Chase*, this Court added at pages 244-245:

"In many other cases this Court has declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law. *Belden* v. *Chase*, 150 U. S. 674, 37 L. ed. 1218, 14 S. Ct. 269, *an 1893 decision which respondent relies upon as establishing a contrary rule, has never been thus considered in any of the later cases cited.*

"It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or in personam such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but

more secure. The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State. So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." (Italics ours.)

And overruling the contention that burden of proof merely presented a procedural question, this Court said, at pages 248-249:

"The Pennsylvania Supreme Court has concluded that in solving problems of procedural, as distinguished from substantive, law, the law court may apply its own doctrine; and that the locus of burden of proof presents a procedural rather than a substantive question.

"Much of what we have said above concerning the necessity of preserving all of the substantial admiralty rights in an action at law is incompatible with the conclusion of the court below. *The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.*" (Citing cases.) (Italics ours.)

(Significantly, this Court, in a footnote, cited *Colonna Shipyard* v. *Bland,* 150 Va. 349; 143 S. E. 729 [59 A. L. R. 497], as a case where the admiralty rule, as to the effect of contributory negligence, was applied by a state court.)

Intagliata v. *Ship Owners etc. Co.,* 26 Cal. (2) 365, 1946 A. M. C. 263, was unanimously decided by the California Supreme Court sitting *en banc.* Though a state court decision, it has been cited by us because it is so carefully considered and so squarely in point. The Court below said it was "precisely in point" (R. 29). This was a civil action to recover damages for injury to a ship on navigable waters. Under California law damages were to be equitably apportioned where both parties were guilty of negligence, depending upon the degree of fault. The admiralty rule, of course, merely provided for an equal division of damages. The court concluded that *Belden* v. *Chase, supra,* was no longer a binding precedent by reason of a long series of subsequent Supreme Court decisions, particularly the *Garrett* case. The opinion is so exhaustive on every phase of the instant question that it would unduly lengthen this brief to satisfactorily quote any material portion.

In *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, the Jones Act was *not* involved. Plaintiff was employed by an independent stevedore and not by the defendant. Was the doctrine of unseaworthiness, which applied in admiralty, also to be applied on the common law side of the court? This Court said at page 88:

> "Petitioner says, first, that the doctrine of unseaworthiness is peculiar to admiralty and cannot be applied in a suit brought on the law side of the court."

In answer to this argument the Court said, at pages 88-89:

> "At the outset we may dismiss the first contention. It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court" (citing the *Garrett* and *Carlisle Packing Co.* cases).

In a footnote, the court said at page 89:

> "Nothing in 28 U. S. C. A., Sec. 41(3), 7 F. C. A. title 28, Sec. 41(3), is to the contrary. The section provides that federal district courts shall have jurisdiction 'of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it * * *' *This does not mean that where suit is brought at law the court is restricted to the enforcement of common-law rights.* * * * '*When a cause of action in admiralty is asserted in a court of law its substance is unchanged.*' *Panama Agencies Co.* v. *Franco* (CCA 5th), 111 F. 2d 263, 266)." (Italics ours.)

Socony Vacuum Oil v. *Smith*, 305 U. S. 424, was an action at law for injuries suffered aboard ship. Although the Jones Act was involved, the court pointed out that even *before* the Jones Act was enacted, contributory negligence was only a ground for mitigation of damages. Thus, the court said at pages 428-429:

> "*Before* the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship' (citing cases).

> • • • *Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages.* See *The Max Morris,* 137 U. S. 1, 34 L. ed. 586, 11 S. Ct. 29; *The Arizona* v. *Anelich,* supra (298 U. S. 122, 80 L. ed. 1080, 56 S. Ct. 707), and cases cited." (Italics ours.)

And concluded at page 431:

> *"Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages."* (Italics ours.)

In *Beadle* v. *Spencer,* 298 U. S. 124, it was uncertain whether plaintiff was protected under the Jones Act. The court held that whether the action be regarded as brought under the Jones Act *or simply under the maritime law for negligence,* the contributory negligence of the plaintiff was only a ground for apportionment of damages. The Court said at page 131:

> "Contributory negligence is not a defense to a suit brought *either* under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under *both* it is ground only for apportionment of the damage, see *The Frank and Willie,* supra; (April 22, 1908), 35 Stat. at L. 66, chap. 149 U. S. C. A. title 45, Sec. 53." (Italics ours.)

Arizona v. *Anelich*, 298 U. S. 110, illustrates our point in a somewhat different way. In that case, the Jones Act was directly involved. The question was whether the admiralty defense of "assumption of risk" should be applied to the Act, even though it did not specifically say so. The court concluded at page 123 that the Jones Act was to be

> "• • • interpreted in harmony with the established doctrine of maritime law of which it is an integral part."

Carlisle Packing Co. v. *Sandanger*, 259 U. S. 255 (constantly referred to in the decisions heretofore cited) did *not* involve the Jones Act. The case was brought for maintenance and cure on the law side of the court. The court held that plaintiff would have been entitled to recover in admiralty, *whether or not negligent*, saying at page 258:

> "The trial court held, 'the basis of the action is negligence,' and instructed the jury according to the common-law rules in respect thereto. It said that if petitioner or its authorized agents negligently filled the can with gasolene and placed it upon the boat, and if, by reason of such negligence, respondent suffered injury, he was entitled to recover compensatory damages therefor, provided he himself had not been guilty of contributory negligence."

The Court added at page 259:

> *"The general rules of the maritime law apply whether the proceeding be instituted in an admiralty or common-law court. Chelentis* v. *Luckenbach S.S. Co.*, supra; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 149, 64 L. ed. 834, 838, 11 A. L. R. 1145, 40 Sup. St. Rep. 438.

> "Here the trial court did not instruct the jury in consonnance with these rules, and, by failing so to do, fell into error." (Italics ours.)

Robins Dry Dock Repair Co. v. *Dahl*, 266 U. S. 449, arose in the New York State courts. The trial court had not only charged the New York rule as to the burden of proof with respect to negligence and contributory negligence, but allowed the jury to consider the effect of a state labor law dealing with defective scaffolds. In holding the charge erroneous, this Court said at page 459:

> "The rights and liabilities of the parties arose out of and depended upon the general maritime law, and could not be enlarged or impaired by the state statute." (Citing the *Chelentis, Carlisle Packing* and other cases) * * * "They *would not have been different if the accident had occurred at San Francisco.*"
>
> "The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court. The error is manifest and material." (Italics ours.)

Chelentis v. *Luckenbach S.S. Co.*, 247 U. S. 372, was a common law action not based upon the Jones Act. We believe that the nub of our position in this point and in Point II may be stated in the following words of the opinion (page 384):

> "Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which

> reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards, rather than those of the maritime law."

The suggestion by petitioner that some of the cases cited below involved seamen, and hence are distinguishable, is not sound. In neither *Garrett* v. *Moore-McCormack Co.*, nor in any of the other cases cited by us, did the decision turn upon the circumstance that a seaman was involved. Seamen are mentioned in one or two of the cases, as wards of the court, only to indicate the *reason* for the *admiralty* rule. Whether such rule should *be applied* on the common-law side of the court was the question involved. The legal principles underlying the application of admiralty principles to all forums, had nothing to do with seamen as such. *Not a single case makes any such distinction.*

New York Cases.

The New York Courts, after some earlier hesitation on the question, (due to *Belden* v. *Chase*), have now also adopted the view that admiralty principles govern in an action at law arising out of a maritime tort:

> *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402;
> *Kuhn* v. *City of New York*, 274 N. Y. 118;
> *Raia* v. *Grace Line, Inc.*, 279 App. Div. 674 (1st Dept.).

In *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, the court said at pages 405-406:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (*Knickerbocker Ice Co.* v. *Stewart*,

253 U. S. 149), we must look to the decisions of the Federal courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal courts. (*Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449, **overruling** *Maleeny* v. *Standard Shipbuilding Corp.,* 237 N. Y. 250.)" (Bold type ours.)

(The *Maleeny* case had held to the contrary.)

In *Kuhn* v. *City of New York,* 274 N. Y. 18, the court said at page 130:

"Because of the location of the accident, the matter was not of local concern and the substantive rights and obligations of the parties arose not out of the local law of New York State, but under the maritime law of the United States (*Robins Dry Dock & Repair Co.* v. *Dahl,* 266 U. S. 449; *Messel* v. *Foundation Co.,* 274 U. S. 427, 429), which any appropriate remedy afforded by the common law and the New York State death statute is saved. (U. S. Code, titl. 28, Sec. 41[3]; Dec. Est. Law, Sec. 130; *Waring* v. *Clarke, supra* [5 How. (U. S.) 441]; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372.) *Notwithstanding the State court has concurrent jurisdiction with the Federal courts to entertain the suit* (*Messel* v. *Foundation Co., supra; Kellogg & Sons, Inc.* v. *Hicks,* 285 U. S. 502, 514) *and the action is brought in the State court, the principles and rules of the substantive maritime law are alone to be applied as ground, if any, for recovery,* (*Robins Dry Dock & Repair Co.* v. *Dahl,* supra; *Chelentis* v. *Luckenbach S. S. Co.,* supra; *Southern Pac. Co.* v. *Jensen,* 244 U. S. 205.)" (Italics ours.)

Recently (November 1951) the Appellate Division, First Department, in *Raia* v. *Grace Lines, Inc.*, 279 App. Div. 647, recognized and reiterated the rule that contributory negligence was not a complete defense to an action at law, arising out of a maritime tort.

As the Court below held (R. 30), the New York authorities indicate that if this action had been brought in the New York courts, the admiralty rule as to contributory negligence would have been applied, rather than the New York common law rule involving non-maritime cases. It seems to follow, that even if Federal courts were obliged to look to the New York courts for guidance under *Erie* v. *Tompkins*, the answer would be the same.

Belden v. Chase.

Belden v. *Chase*, as heretofore noted, was specifically considered by this Court in 1942 in *Garrett* v. *Moore-McCormack Co., supra.* The Court refused to follow the *Belden* case, pointing out that it was an 1893 decision and had never been considered in any later cases in that court. Furthermore, *Belden* v. *Chase* was completely ignored in the other cases we have cited, although frequently relied upon by the unsuccessful parties. In the *Intagliata* case, the California court said at page 371 of its opinion:

> "Subsequent decisions of the United States Supreme Court, however, compel the conclusion that *Belden* v. *Chase* (supra) is no longer a binding precedent."

And *Belden* v. *Chase* has not only been questioned by the courts but by many writers as well:

> 6 N. Y. U. Law Review, 14, 30 (1929) (an article by Professor Geo. C. Sprague, written even before the *Garrett* decision);

63 Harvard Law Review, 246 (1950);
Robinson on Admiralty, Third Edition (1939)
Pgs. 860-862.

In Robinson on Admiralty, the author states at page 860:

> "The *Belden* decision was before the Court's recent development of uniformity in maritime law. But if a right arises under the corpus juris maris, ratione loci, and if by the lex loci delicti—the navigable waters of the United States—contributory negligence does not defeat the action, the choice of forum should be of no significance. In ordinary conflict of laws contributory negligence is part of the substance of the 'right'. This, the Court of Appeals itself recognized in *Fitzpatrick* v. *International Ry.* (252 N. Y. 127)."

The Second Circuit, prior to the *Garrett* decision, had felt bound to follow *Belden* v. *Chase*. Even then, however, in *Re Pennsylvania Ry. Co.*, 48 F. (2) 559, the court entertained doubt as to the soundness of *Belden*, saying at page 566:

> "So far as we can find there is nothing in the books beyond our own overruled dicta which throws doubt upon *Belden* v. *Chase*. And so we hold, though *we acknowledge the anomaly*, that in a case such as this the damages must be divided." (Italics ours.)

Just as *Erie* v. *Tompkins* makes the state law supreme in local matters, so, we submit, are uniformity and consistency served if all courts followed the maritime law—"the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law"

(*O'Connell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36, 40; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160). The law should not depend on where plaintiff chances to bring his action (*Robins Drydock* v. *Dahl*, *supra*).

POINT II.

The error in the trial court's charge, placing upon respondent the burden of proof on the issue of contributory negligence entitled respondent to a new trial, in any event.

Petitioner cites not a single authority, nor does it present any argument whatever, indicating any error by the court below, on the issue of burden of proof.

Of course, even if contributory negligence were a complete defense to respondent's action, the question as to who had the *burden of proof* on such issue would still remain. In failing to argue this question, petitioner must be regarded as conceding the correctness of the Court of Appeals' decision on this point and that respondent is, under any circumstances, entitled to a new trial.

At any rate, *Garrett* v. *Moore-McCormack Co.*, and all of the other cases cited by us in our first point, are equally appropriate on this issue. In fact, in the *Garrett* case, the applicability in a State Court, of an admiralty rule on burden of proof, was directly involved. As this Court said (317 U. S. 239, 249):

> "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was part of the very substance of his claim and cannot be considered a mere incident of a form of procedure."

The burden of proof as to contributory negligence is upon defendant, in maritime causes (*Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551; *The Anna O'Boyle* [2nd Cir.] 124 F. [2] 180; *LaGuerra* v. *Brasileiro* [2nd Cir.] 124 F. [2] 553, cert. den. 315 U. S. 824; *The Diamond Cement* [9th Cir.] 95 F. [2] 738; *Goodrich Transit Co.* v. *City of Chicago* [7th Cir.] 4 F. [2] 636). In fact, the same rule is applied to all cases involving purely federal law (*Central Vermont Ry.* v. *White,* 238 U. S. 507; *Kierce* v. *R.R.* [2nd Cid.] 79 F. [2] 198, cert. den. 296 U. S. 629; *Fitzpatrick* v. *R.R.,* 252 N. Y. 127).

And New York recognizes the maritime rule: In *Danielsen* v. *Morse Dry Dock & Repair Co.,* 235 N. Y. 439, Judge Cardozo said at page 444:

> "The burden of proving contributory negligence was on the defendant. This is so whether we apply the maritime law (*Central Vermont R. R. Co.* v. *White,* 238 U. S. 507, 512; *Inland & Seaboard Coasting Co.* v. *Tolson,* 139 U. S. 551, 557) or the law of the state (Labor Law, Sec. 202-a; *Hall* v. *N. Y. Telephone Co.,* 220 N. Y. 299)."

It is even questionable that federal courts are dependent on diversity for jurisdiction of maritime torts. It will be noted that under Title 28, Section 1333 of the U. S. Code, Annotated (cited at pages 2-3 of the petition) the district courts have *original* jurisdiction of any civil case of admiralty or maritime jurisdiction. Accordingly, it was held in *Jannson* v. *Swedish American Line* (1st Cir.) 185 F. (2) 212 and in *Vitozi* v. *Balboa Shipping Co.* (1st Cir.) 163 F. (2) 286, that despite allegations of diversity of citizenship, federal courts also have original jurisdiction of maritime causes. If this be so, the rule placing the burden of proof as to contributory negligence

upon the plaintiff, in cases involving federal law automatically applies, even without considering the effect of the *Garrett* case and the other cases referred to in Point I of this brief.

And as we have indicated in our first point, if the New York law were to be applied, the result would be no different. New York applies the federal rule in maritime cases (*Riley* v. *Agwilines, Inc.*, 296 N. Y. 402; *Kuhn* v. *City of New York*, 274 N. Y. 118; *Raia* v. *Grace Lines, Inc.*, 279 App. Div. 647 (1st Dept.).

Under this point, respondent is entitled to a new trial, in any event.

CONCLUSION.

It is respectfully submitted that the questions which petitioner seeks to raise have been thoroughly answered by prior decisions of this court, that the respective circuits are not in conflict and there is no occasion for further review. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 15, 1952.